SINGAPORE REPORTS.

LIM AH OH AND ANOR. v. REX.

[C.C.A. (Murray-Aynsley, C.J., Storr and Thorogood, JJ.) September 12, 1950]

[Singapore — Criminal Appeal No. 12 of 1950]

Criminal Procedure Code, s. 124 — Statement of Police Officer to accused — Whether admissible against accused — Evidence Ordinance, s. 27.

In this case the appellants appealed against their conviction on a charge of robbery. At the trial evidence was given of questions put by the Police Inspector who was investigating the case to the accused persons, and of what the accused did as a result of the questioning.

Held, (1) that generally a statement made in the presence of a party is evidence against him as evidence of a factum probans in the light of the reaction of the party to what is said, but when section 124 of the Criminal Procedure Code operates, such evidence should not be admitted as in such a case the jury cannot be invited to draw an inference from the reaction of an accused person; (2) that section 27 of the Evidence Ordinance permits evidence of what the accused said by way of exception to section 124 of the Criminal Procedure Code, but in such cases evidence must be given of what the accused said and the jury should not be ordered to guess what he said; (3) that there was a misdirection to the jury in this case and therefore the convictions must be quashed.

Case referred to :—

(1) *Rex v. Christie* (1914) A.C. 545.

COURT OF CRIMINAL APPEAL.

Appellants in person.

A. H. Simpson (D.P.P.) for the Crown.

Murray-Aynsley, C.J. : — In this case the appellants were found guilty of robbery by a majority of five to two. The learned trial Judge concurred with that verdict and sentenced both appellants to three years' rigorous imprisonment.

At the trial there was no evidence of identification of the appellants at the time of the robbery but there was evidence that the appellants were in possession of property stolen at the time of the robbery very shortly afterwards.

In the case of the first appellant certain matters need consideration.

It transpired in the course of the trial that an Inspector of Police, Elam Din, visited the house of the first appellant and arrested both him and his wife at about 1 a.m. on April 12th last, that is, about six days after the robbery. The Inspector gave evidence that at about 6.30 a.m. on the same day the first appellant took the Inspector to 39 Jalan Besar, where the second appellant was arrested.

At this stage the Inspector was asked the following questions :—

"Did you say anything to him before he took you there?"

Answer — "Yes, I did."

"What did you say?"

Answer — "I asked him who else were involved in the robbery."

"You asked who else were involved in the robbery?"

Answer — "Yes."

Later, after the Inspector had described how he had arrested the second appellant, he was asked

"And did you question him?"

Answer — "I did."

"As the result of the questioning did he take you anywhere?"

Answer — "He took me to 27 Havelock Road."

"And the second accused volunteered further information to you?"

Answer — "He did?"

"Where did the second accused take you after that?"

Answer — "To No. 4 Merchant Road."

"Did he tell you why he was taking you there?"

Answer — "He did."

"What did he say to you?"

Answer — "He had pawned a watch there."

"What kind of a watch?"

Answer — "He could not tell what type of a watch."

"He said that he pawned a watch there?"

Answer — "Yes."

It is clear that by section 124 of the Criminal Procedure Code nothing that either of the appellants said could be given in evidence. In the case of the second appellant this evidence could perhaps be justified by section 27 of the Evidence Ordinance. In the case of the first appellant an attempt was made to lead the jury to infer that a confession had been made by giving evidence of what the Inspector said.

In the course of his summing up the learned Judge said as follows :—

"Well, the Police then made enquiries. Owing to the nature of the local law, you do not know exactly

what those enquiries were. Although you can know what the Police said to the accused, you cannot be told what the accused said to the Police while they were in the custody of the Police. But the Inspector tells you that he said to the man, that is the first accused in the dock: "Who else were involved in the robbery." That is what he gives as the words he used: "Who else were involved in the robbery." And as the story is that there were six people, of course, that may mean: "Who were the other five". In answer to that question, you are told that the first accused then took the Police to No. 39 Jalan Besar, where they found the second accused."

The use of the words "who were the other five" seems to me to be an invitation to the jury to conclude that the appellant was the missing one.

This seems to me to be entirely wrong. Even if the question were admissible, it does not necessarily follow that the appellant had said anything of the sort, nor did it necessarily follow that the question related to anything that this appellant had said. Even if he had referred to one person, that person was not necessarily himself.

It is also wrong to refer to an act as being the consequence of another act or statement which is withheld from the jury. Whether a thing is the consequence of another is a matter of opinion in every case, inference which a jury may form, not a statement of fact. The learned Judge also said: "You can know what the Police said to the accused." Without qualification, I think that that is a misleading statement of the law. It is commonly stated in English law that what is stated in the presence of a party is evidence against him. It should be noted that this is not now to be treated as an exception to the rule against hearsay but as evidence of a *factum probans,* in light of the reaction of the party to what is said (see *Rex v. Christie*[1]). The rule against hearsay is found in section 60 of the Evidence Ordinance. On this matter I think that the rule is the same as in England and that under that section evidence of statements might be admitted provided always that the reason of admitting was borne in mind, and carefully explained to the jury, if there was one.

However, when section 124 of the Criminal Procedure Code operates, I do not think that the jury can ever be invited to draw an inference from the reaction of an accused person. Therefore in such cases evidence of this kind should never be admitted. Section 27 in certain cases permits evidence of what an accused person said, by way of exception to section 124 of the Criminal Procedure Code and of the provisions relating to confessions. But evidence must be given of what the appellant said. Nothing justifies inviting the jury to guess what he said.

In view of this I consider that the conviction of the first appellant should be quashed.

As regards the second appellant, the position is rather different.

There evidence was not given of what the Police said in his presence. His own evidence clearly showed that he had on the morning after the robbery pawned certain articles in respect of which there was satisfactory evidence that they had been stolen at the time of the robbery. There was also evidence from which the jury might infer that this appellant had used a false name at the time of the pawning. Though there was evidence on which the jury might have convicted, there are passages in the summing up towards the end — "if you believe it, you believe it entirely" (p. 60), "if you believe their story in full" (p. 62) — which seem to suggest a rather heavier burden on the accused than the law requires, although elsewhere the position had been explained adequately to the jury. There is, however, a passage in the summing up which I think may have misled the jury. After dealing with a visit to pawnshops in which certain articles were recovered, the learned Judge, who had commented on the point that there was no evidence of what the Police had said to the second appellant, said: "There might be evidence that Police had asked the accused 'where is the property you stole?'..... There is not even that evidence." I think that that passage is likely to have misled the jury into thinking that something of the sort had been said, or that they could infer that it had been said. In view of that I consider that the appeal of the second appellant should be allowed also.

Appeal allowed.

DIANA ELLIS v. KHOO EK NEO & ANOR.

[Court of Appeal (Murray-Aynsley, C.J., Storr and Thorogood, JJ.) August 22, 1950]

[Singapore — Civil Appeal No. 8 of 1950]

Conveyancing and Law of Property Ordinance (Cap. 118) — Implied covenants for title — Conveyance free from encumbrances — Reconveyance executed by Custodian of Enemy Property during Japanese occupation — Claim for damages — Procedure — Debtor and Creditor (Occupation Period) Ordinance, 1949.

In this case the appellant, Khoo Ek Neo, was the owner of certain premises in Telok Ayer Street, Singapore. These premises were mortgaged to the plaintiff, Diana Ellis. During the Japanese occupation a reconveyance was executed by the Japanese Custodian of Enemy